

SUPREME COURT NO. _____
COURT OF APPEALS NO. 38739-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

REBA REED,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard A. Jones, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Reba Reed, the respondent below, asks this Court to review the Court of Appeals decision referred to in Section B.

B. COURT OF APPEALS DECISION

Reed requests review of the Court of Appeals decision in State v. Reed, Court of Appeals No. 38739-1-I, filed June 16, 1997 (attached as Appendix A).

C. ISSUES PRESENTED FOR REVIEW

1. Was Reed entitled to a "no duty to retreat" instruction at trial?

2. Does the Court of Appeals decision in Reed's case conflict with this Court's decision in State v. Allery, 101 Wn.2d 591, 682 P.2d 312 (1984)?

3. Does the decision also conflict with Division II's decision in State v. Hanson, 59 Wn. App. 651, 800 P.2d 1124 (1990)?

D. STATEMENT OF THE CASE

1. Trial Proceedings

Reed hereby incorporates her "Statement of the Case" found at pages 2-14 of her Brief of Appellant, filed with the Court of Appeals and

attached to this Petition as appendix B.

Reed was charged with assaulting the mother of her granddaughter. Her defense at trial was self-defense and she requested that the trial court give WPIC 17.05, otherwise known as the "no duty to retreat" instruction. That instruction reads:

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that she is attacked to stand her ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

4RP 128; CP 10.

The prosecutor responded by arguing that such an instruction is appropriate only where the altercation occurs in a person's home or business.

The prosecutor indicated that she would like to review State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984), but didn't believe that the instruction was appropriate. 4RP 129.

Initially, the court reserved ruling. 4RP 129-30. Later, the court declined to give the proposed instruction, reasoning as follows:

The Court reread the Allery decision, and I believe that that decision is limited to the facts of that particular case. That particular opinion regarded the circumstance where the victim in that case was a woman who was

at her home. And it was a situation where her husband had placed her in a situation where she pulled a firearm or a rifle out and shot him when she believed he was coming after her with a knife.

Under those circumstances, since she was at her home, the Court believes that those circumstances limit it to the particular facts of that case. And the Court's not aware of any other case that would support the giving of that type of instruction under the circumstances before this Court. For those reasons, the Court will not be giving that particular instruction.

5RP 144.

During closing argument, the prosecutor specifically asked the jury to consider what alternatives to the use of force existed for Reed at the time of the altercation. 6RP 81-82. The jury convicted Reed. 7RP 4.

2. Argument on Appeal

On appeal, Reed pointed out that it has long been the law in Washington that a person bears no duty to retreat when he or she is assaulted in a place where he or she has the right to be. Brief of Appellant, at 16 (citing Allery, 101 Wn.2d at 598; State v. Hiatt, 187 Wash. 226, 237, 60 P.2d 71 (1936)).

Reed also emphasized that a defendant is

entitled to a "no duty to retreat" instruction whenever there is sufficient evidence in the record to support it. Brief of Appellant, at 16 (citing Allery, 101 Wn.2d at 598).

Reed argued that there was substantial evidence at trial to support the instruction because on at least three separate occasions, she had an opportunity to flee but, instead, chose to exercise her right to stand her ground during the altercation. Brief of Appellant, at 20-21.

She pointed out that her jury had been instructed that self defense is justified only when the force used "is not more than necessary." CP 32. Her jury was also instructed that force was "necessary" only where "no reasonably effective alternative to the use of force appeared to exist and that the amount of force was reasonable to effect the lawful purpose intended" CP 33.

In light of the absence of a "no duty to retreat" instruction, Reed argued that there was a significant possibility that a reasonable juror may have found the defense evidence credible, but erroneously concluded that she used excessive force because she never used the obvious and reasonably

effective alternative of retreat. Brief of Appellant, at 19.

In support of her argument, Reed relied on State v. Williams, 81 Wn. App. 738, 916 P.2d 445 (1996), where a similar failure to give a "no duty to retreat" instruction required reversal. Brief of Appellant, at 16-19.

3. The Court of Appeals Decision

The Court of Appeals never addressed the trial court's reasoning that a "no duty to retreat" instruction is only available to one who attempts to defend herself in her own home.

Instead, the Court concluded that because of the nature of the altercation, Reed never had a clear opportunity to "escape because the victim continued to kick or hit her." Slip opinion, at 6.

Thus, the Court concluded, retreat was not a reasonably effective alternative and substantial evidence did not support the instruction. Slip opinion, at 6.

The Court also concluded that because neither the State nor the defense focused on Reed's failure to retreat, "retreat was not an issue at trial." Slip opinion, at 6.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review of Reed's case for two reasons. First, the Court of Appeals decision conflicts with this Court's decision in State v. Allery, 101 Wn.2d 591, 682 P.2d 312 (1984). RAP 13.4(b)(1). Second, the decision conflicts with Division II's opinion in State v. Hanson, 59 Wn. App. 651, 800 P.2d 1124 (1990). RAP 13.4(b)(2).

1. Conflict with a Decision by this Court

In Allery, this Court made it clear that in Washington, a person bears no duty to retreat when she is assaulted in any place where she has a right to be. This Court also made it clear that a defendant is entitled to a "no duty to retreat" instruction whenever there is evidence to the record to support it. Allery, 101 Wn.2d at 598.

The evidence at Reed's trial revealed three opportunities for retreat. Therefore, Reed was entitled to an instruction informing the jury that she could lawfully stand her ground rather than flee. The Court of Appeals decision misconstrues the facts below and conflicts with Allery.

2. Conflict with a Decision by Another Division of the Court of Appeals.

In State v. Hanson, 59 Wn. App. 651, 656, 800 P.2d 1124 (1990), Division II of the Court of Appeals stated the well-established rule that when evaluating the propriety of a particular jury instruction, a court is to evaluate the evidence in the light most favorable to the proponent of the instruction.

The decision by Division I in Reed's case is contrary to this principle. Instead of evaluating the trial evidence regarding Reed's opportunity to retreat in the light most favorable to Reed, the court evaluated the evidence in the light most favorable to the State. By no other means could the Court of Appeals have concluded that there was insufficient evidence to support a "no duty to retreat" instruction.

F. CONCLUSION

For the reasons stated above, Reed respectfully requests that this Court grant review of her case and reverse the Court of Appeals.

DATED this ____ day of July, 1997.

Respectfully submitted,

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